LIM GEAK LIANG

v.

EAST WEST - UMI INSURANCE BHD.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL APPEAL NO. 12-53-90]
16 DECEMBER 1993

INSURANCE LAW : Personal accident policy - Refusal by insurance company to pay under the terms of the policy - Whether there was non-disclosure of material fact - Whether there was a breach of condition 4 of the policy - Whether condition 4 was a condition precedent to the attachment of liability - Whether insurance company entitled to repudiate liability.

The plaintiff alleged that during the currency of a policy he had taken out with the defendant, he accidently chopped off his left thumb. Under the terms of the policy the plaintiff was entitled to be paid RM50,000 for his permanent disablement.

The defendant refused to pay the compensation to the plaintiff on the grounds:

(1) that the plaintiff had failed to disclose a material fact in the proposal form namely that he had a personal accident policy issued by Overseas Union Insurance Sdn. Bhd. giving him coverage of RM200,000; and
(2) that the plaintiff was in breach of condition 4 of the policy of insurance when he failed to inform the defendants that another insurance policy had been issued to him during the currency of the policy.

The plaintiff's claim was dismissed by the lower Court and the plaintiff appealed.

Held:

[1] The agent of the defendant was informed by the plaintiff that he had a personal accident policy with "Syarikat Hua Lian" (the Chinese language version of Overseas Union Insurance Sdn. Bhd.) and it was clear that the agent's knowledge shall be deemed to be the knowledge of the defendant under s. 44A(1) of the Insurance Act 1963. In the circumstances the defendant cannot void the policy on the ground that the plaintiff failed to disclose a material fact in the proposal form.

[2] Condition 4 of the policy required the plaintiff to give notice to the defendant of any other policy issued to him during the currency of the policy and the defendant was entitled to rely on this clause to say that the plaintiff had not fulfilled his obligation to inform them of the insurance policy issued by Royal Insurance (Malaysia) Sdn. Bhd.

[3] The second opening clause in the policy issued by the defendant made condition 4 of the policy a condition precedent to the right to recover under the policy and as the plaintiff was in breach of condition 4, the defendant was entitled to repudiate liability.

[Appeal dismissed with costs].

Cases referred to:

China Insurance Co. Ltd. v. Ngan Ah Kau [1972] 1 MLJ 52 ***(refd)***

Newsholme Brothers v. Road Transport and General Insurance Co. Ltd. [1929] 2 KB 356 ***(refd)***

Legislation referred to:

Insurance Act 1963, s. 44A(1), (2), (3)(a), (b)

Other sources referred to:

Mac Gillivray & Parkington on Insurance Law (8th Edn.) p. 600, para 602

For the appellant - E. Mayandi (Hamzah Muhamad with him); M/s. Choe, Shakri & Hamzah
For the respondent - R. Zechariah; M/s. James Foong Anad & Associates

JUDGMENT

K.C. Vohrah J:

The plaintiff took a policy of insurance from the defendant company on 20 May 1986 insuring himself against personal injury or death from 14 May 1986 to 14 May 1987. The plaintiff alleged that during the currency of the policy he accidentally chopped off his left thumb. Under the terms of the policy he was entitled to be paid RM50,000 for his permanent disablement.

The insurance company disputed that the plaintiff accidentally chopped off his thumb. The company also refused to pay him the compensation on two grounds as follows:

1. That he failed to disclose a material fact in the proposal form that he had a personal accident policy issued by Overseas Union Insurance Sdn. Bhd. giving him coverage of RM200,000.

2. That he was in breach of condition 4 of the policy of insurance when he failed to inform the defendants that another insurance policy had been issued to him during the currency of the policy.

The learned Judge of the Sessions Court made a finding that the defendant had accidentally cut off his left thumb. Although the defendant company disputed this in its pleadings and at the trial, this finding is not disputed at the appeal.

The plaintiff in his evidence stated that at the time he signed the proposal form he had a personal accident policy issued by Overseas Union Insurance Sdn. Bhd. for a coverage of RM200,000. His evidence was that when the agent of the defendant, one Ch'ng Ban Hoe, asked him whether he was holding any policy he informed him that he had one with "Syarikat Hua Lian" as he did not know the English equivalent of the company's name. It was Ch'ng who wrote "Yes, Unirite RM200,000 P.A." in response to question 5 on the proposal form, "Have you any Personal Accident or Life Insurance with the company or elswhere? If so, please give details." It is clear that the Judge accepted the plaintiff's version of what transpired. It is also clear that the defendant did not dispute that Ch'ng Ban Hoe was its agent at the relevant time.

As regards the **first ground** the learned Judge accepted that the answer, "Yes, Unirite RM200,000 P.A." to question 5 by the plaintiff in the proposal form was inaccurate. And she pointed out:

> At the bottom of the proposal form, PWl (the plaintiff) had warranted that 'the above statements and particulars are correct and complete'. He also agreed that 'this proposal shall be the basis of the contract between me and the company'. If the policy contains a recital that the proposal therein referred to shall be the basis of the contract, the truth of the statements contained in the proposal is thereby made a condition of the liability of the insurers, and any inaccurate answer will entitle the insurers to repudiate liability apart from any question of materiality' - see **Mac Gillivray & Parkington on Insurance Law** (8th Edn.) p. 600, at para 602.

While learned Judge held that the answer to question 5 was inaccurate, she said "Unirite" was one of the agents of the defendant where the proposal was ultimately checked and the defendant should have been put on enquiry and that the fact that they did not do so constitued a waiver. She held, however, that the pleadings of the plaintiff (the reply) did not raise the issue of waiver. On the basis of *China Insurance Co. Ltd. v. Ngan Ah Kau* [1972] 1 MLJ 52 she held that the plaintiff cannot escape from the consequences of his negligence by blaming the wrong answer to question 5 on the defendants' agent, when he chose to sign the proposal form (P2) without verifying that the answers were correctly stated. She relied on the judgment of Ali FJ in the case where he cited with approval the case of *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356 and relied on the dictum of Scrutton LJ which is as follows:

> In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document he knows to be a proposal for insurance, and which contains statements which are in fact, untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of the negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.

Counsel for the plaintiff has, however, argued that s. 44A of the Insurance Act 1963 (which came into force on 1 November 1980, see PU(B) 440/1980) applies in this case and that the agent who filled up the proposal form was also the agent of the defendant and the issue of waiver is irrelevant. I agree. Section 44 A reads:

> 44A.(1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
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> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.
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> (3) This section shall not apply -
>
> (a) where there is collusion or connivance between such person and the

proposer in the formation of the contract; or

(b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

It will have to be noted that the above provision was not brought to the attention of the Judge. She therefore had no opportunity to consider its import on the case.

As I had observed earlier, it is not disputed that Ch'ng Ban Hoe was the agent of the defendant, an insurance company. He was given the information by the plaintiff that he had a personal accident policy with "Syarikat Hua Lian" (the Chinese language version of Overseas Union Insurance Sdn. Bhd.) and it seems clear that his knowledge shall be deemed to be the knowledge of the defendant under s. 44A(1) and the defendant cannot void the policy on the ground that the plaintiff failed to disclose a material fact in the proposal form.

As regards the second ground it is necessary to set out condition 4 of the policy which reads:

> The Insured shall give immediate notice to the company of any changes of address occupation pursuits or any injury, disease, physical defect or infirmity by the Insured has become affected and also notice of any other Insurance (excepting coupon or in connection with a Motor Insurance Policy) **effected** against accident or incapacity.

The plaintiff had become a member of the "Eagle Card" scheme. "Eagle Card" is a discount card. In consideration of his becoming a member of the scheme, he was assured under the Group Personal Policies with American International Assurance Co. Ltd. from 6 January 1986 to 5 January 1987 for RM100,000 and with Royal Insurance (M) Sdn. Bhd. for RM100,000 from 12 January 1987 to 11 January 1988. The defendant company complained that the plaintiff did not inform the defendant of the insurance with the Royal Insurance (M) Sdn. Bhd.

The plaintiff contended that he was not required to give notice of any other policy of insurance effected against accident where such policy was effected after or during the policy issued by the defendant. Alternatively it was averred that condition 4 was vague and ambiguous.

The learned Judge found no ambiguity in the language of condition 4 and ruled against the plaintiff. I agree with her interpretation of condition 4 that the plaintiff was required to give notice to the defendant of the policy issued by Royal Insurance (Malaysia) Sdn. Bhd.

She carefully stated:

> It is settled law that if there is ambiguity in, the language of the policy it must be construed more strongly against the party who prepared it, which in this case is the defendant company. However, I saw no ambiguity in the said condition. Reading the condition as a whole; it can only be taken to mean that the insured is required to give immediate notice of any other policy against accident which has been effected during the currency of the policy. The condition refers to change of address or occupation. Logically, this would mean any change after the policy has been effected and not prior to it. Similarly the reference to 'any injury, disease ... by which the Insured has become affected' indicates that the material time must be the period after the policy has come into effect. The use of the words 'has become' clearly indicated that the Insured was not affected by such injury or disease at the commencement of the policy.

Counsel for the plaintiff a1so argued that condition 4 was not a condition precedent to liability on the part of the defendant but the short answer to that is that the second opening clause in the policy issued by the defendant company states that if during the period of the policy of insurance "the Insured shall sustain such bodily injury ... the company will subject to the terms provisos exclusion and conditions of and endorsed in this Policy (**which terms provisos exclusions and conditions shall** so far as their nature of them respectively will permit **be deemed condition precedent to the right to recover under this Policy**) pay to the insured ... the sum or sums specified in the Table of Benefit" (emphasis added)

The plaintiff was fully aware of the policy of insurance issued to cover him by virtue of his being a member of the "Eagle Card" scheme and the defendant is entitled to rely on this clause to say that the plaintiff had not fulfilled his obligation to inform the defendant of the insurance policy issued by Royal Insurance (Malaysia) Sdn. Bhd.

In the result the appeal must fail and I accordingly dismiss the appeal with costs.